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In The
Supreme Court of the United States

CHRISTOPHER TODD BROWN,

Petitioner,

v.

CHARLES LI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus, Foundation for Individual Rights in Education ("FIRE"), is a nonprofit educational foundation devoted to free speech, individual liberty, religious freedom, the rights of conscience, legal equality, due process, and academic freedom on our nation's college and university campuses.[1] FIRE's mission is to defend and sustain individual rights at America's increasingly repressive colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience – the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them.

Amicus has an interest in enforcing the First Amendment's prohibition against governmental interference in public debates, especially when those debates take place in our nation's institutions of higher learning. *Amicus* actively supports individuals in disputes within or against educational institutions, and attempts to educate college and university administrators about freedom of conscience. Because *Amicus* believes that the Ninth Circuit Court of Appeals' extension of the doctrine of *Hazelwood School Dist. v. Kuhlmeir*, 484 U.S. 260 (1988) to communications that take place on the nation's

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[1] Pursuant to Supreme Court Rule 37.6, this brief is filed with the written consent of all parties. Written consent is filed with this Court. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

campuses will have an impermissible chilling effect on Free Speech and Academic Freedom, it submits this brief *amicus curiae* in support of Petitioner.

REASON FOR GRANTING THE WRIT

1. In addition to the reasons set forth in Petitioners Brief, the Court should grant the Petition because the decision of the Ninth Circuit Court of Appeals poses a serious and immediate threat to Freedom of Speech, Freedom of Conscience and Academic Freedom on the campuses of our nation's colleges and universities. Those freedoms have come under increasing attack from administrators and government officials. If the decision below is not reversed, students and professors at America's institutions of higher education will be greatly deterred from addressing any of the important and controversial issues of our day. This chilling effect will deprive the public of the clash of competing viewpoints that undergirds the First Amendment.

2. Extending the rule of *Hazelwood* to institutions of higher education ignores the long history of freedom of debate, criticism, and comment upon which our great universities were founded. Allowing professors and students to freely explore and opine on the difficult and controversial issues of the day, while subjecting those opinions to the scrutiny and criticism of their learned peers, serves both the educational mission of these institutions and the greater public good, and has traditionally been protected from unwarranted governmental interference.

I. IF THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS ALLOWED TO STAND, IT WILL IMPERMISSIBLY CHILL SPEECH ON OUR NATION'S COLLEGE CAMPUSES.

A. College Campuses are Increasingly Becoming Places of Academic Repression, not Academic Freedom.

Colleges and universities are intended to be the ultimate bastions of free speech, free thought, and free expression in a democratic society. Increasingly, however, American universities are betraying their heritage and, in the case of public universities, violating the civil rights of students and professors by enforcing ideologically narrow and rigid views through censorship, double standards, and a judicial system devoid of due process.

In the last several years, the instances of repression of free thought and speech have increased. Perhaps the best known example is the 1993 "water buffalo" incident, in which a University of Pennsylvania student was charged with racial harassment for calling a group of rowdy students "water buffalo," despite the fact that the term has no racial connotation. However, since that time the instances of repression and abuse of authority have only increased. Many of these cases have been well documented by *amicus* and by one of the counsel for *amicus*, including:[2]

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[2] These cases were investigated and verified by *amicus* as part of its mission to expose threats to free speech and academic freedom. They are archived at www.thefire.org. *See also* Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on American's Campuses* (New York: The Free Press, 1998).

July 2000. A professor at Monterey Peninsula College is denied permission to teach a class because he failed to address the requirement that he "include a description of how course topics are treated to develop a knowledge and understanding of race, class and gender issues," a requirement for all classes, including math and science classes.

October 2000. The Cardozo Professor of Jurisprudence at Columbia University was informed by the Law School Dean that an exam question in his criminal law class was possibly "unlawful" because it may have violated "harassment" law and discriminated against women by creating a "hostile environment."

March 2001. The Bucks County Community College institutes a loyalty-oath-like requirement that applicants for teaching positions "provide a brief statement of your commitment to diversity and how this commitment is demonstrated in your work."

March 2001. The Young Americans for Freedom at Penn State University have the phrase describing rights as "God-given" removed from their constitution because this phrase is deemed "discriminatory" by the Penn State administration.

March 2001. A world-renowned poet and professor at the University of Alaska, Anchorage, is subject to investigation by university officials after publishing a poem titled "Indian Girls" about sexual abuse of children.

October 2001. A Vice-Provost at Penn State University condemns a professor's web-published opinions about American foreign policy as "insensitive" and "intimidating."

Intimidating speech is grounds for discipline at Penn State.

October 2001. A San Diego State University student is charged with abusive behavior after challenging the opinions of fellow students who expressed delight about the terrorist attacks of September 11.

October 2001. After a University of New Mexico professor jokes about the September 11 attacks, the University President investigates and disciplines the professor.

October 2001. Central Michigan University students are ordered to remove patriotic posters from their dorm rooms because an administrator deemed them "offensive."

October 2001. An Orange Coast College professor is suspended after he argued that silence on crimes against Christians and Jews in the Middle East was consent to terrorism.

December 2001. After receiving a student email that blamed the United States for bringing on the September 11th terrorist attacks, a University of North Carolina-Wilmington professor responded with a one-paragraph reply stating that the opinions were "undeserving of serious consideration." The student claimed the email was harassing, and the university responded by investigating the professor and requiring him to reveal all of his email correspondence on the subject.

December 2001. The University of South Florida officially begins the termination process of a tenured professor because outside criticism of his views caused a "disruption" to the university.

February 2002. A policy that restricts Free Speech to two small "free speech zones" on the public campus of West Virginia University is publicly exposed.

April 2002. After questioning University-sponsored mandatory diversity training, professors at the University of Alabama are investigated by the Faculty Senate because they had allegedly "interacted with members of the Legislature to attempt to lessen the legislative appropriation which the University receives."

May 2002. A University of South Carolina professor mandates certain "guidelines for discussion" requiring class participants to profess to certain political beliefs.

These cases amply illustrate that administrators on the campuses of our nation's universities have not hesitated to suppress speech and mandate orthodoxy in the face of the First Amendment. Should the decision of the Ninth Circuit Court of Appeals stand, the Courts would, in essence, be granting permission for university administrators to stifle Free Speech under the guise of "pedagogical concern." Such a result would be disastrous to the concept of liberty upon which the leading public universities were founded and which in significant measure has accounted for their enormous success.

B. The Traditional Role of Colleges and Universities as Bastions of Free Expression is Threatened by the Ninth Circuit's Extension of *Hazelwood*.

Colleges and universities in the United States have been the source of much of the critical thinking on public policy questions, especially during the twentieth century.

Richard Hofstadter, a leading U.S. historian of the twentieth century, declared, "No one can or should underestimate the contributions of research to American life, nor the ideas which university scholars have given to the material and intellectual well-being of our society." Richard H. Hofstadter, The Development of Higher Education in America, in *The Development and Scope of Higher Education in the United States* 66 (Richard H. Hofstadter & C. DeWitt Hardy eds., 1952). Similarly, Arthur M. Cohen wrote in his sweeping survey of American higher education history, "The Enlightenment dream was that debates on justice and equity would take place in a public arena, that an ever-evolving quest for truth would replace tradition. Research, experimentation and rational inquiry in the universities fit the dream." Arthur M. Cohen, *The Shaping of American Higher Education: Emergence and Growth of the Contemporary System* 129 (1998). Arthur O. Lovejoy, one of the founders and early leaders of the American Association of University Professors, observed in the 1930 edition of the Encyclopedia of Social Sciences that the ultimate social good of a university "is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate from the generally accepted beliefs or from those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities" (quoted in William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 L. & Contemp. Probs. 79, 87 (1990)).

This Court has unequivocally held that there is "no doubt that the First Amendment rights of speech and association extended to campuses of state universities."

Widmar v. Vincent, 454 U.S. 263, 268-69 (1981). One of the first and best expressions of this protection came in 1957, in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), in which the Court, seeking to protect the sanctity of the teaching process from the depredations of the state's efforts to coerce professorial conformity and expressions of loyalty during the McCarthy era, reversed a professor's contempt citation. In doing so, the Court made clear its displeasure with the intrusion into the teaching process and into the professor's conscience and views. The Court stated that the "essentiality of freedom in the community of American universities is almost self-evident. . . . Scholarship cannot flourish in an atmosphere of suspicion and mistrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250. "To impose any strait jacket upon the intellectual leaders of our colleges and universities," warned the Justices, "would imperil the future of our Nation." *Id.*

Justice Felix Frankfurter wrote a concurring opinion in which he criticized the then-politically correct justification the state had asserted for wielding powers of inquiry and intimidation over academics – the notion that interference with academic freedom could occur "in a limited area in which the legislative committee may reasonably believe that the overthrow of existing government by force and violence is being or has been taught, advocated or planned." This "governmental intrusion into the intellectual life of a university" created such "grave harm," Justice Frankfurter warned, that this purported justification for repression was inadequate. He stressed "the dependence of a free society on free universities" and

decried the state's "intervention . . . that inevitably tends to check the ardor and fearlessness of scholars." *Sweezy*, 354 U.S. at 261-62 (Frankfurter, J., concurring).

Subsequent cases decided by this Court followed Justice Frankfurter's lead and adopted the rationale that First Amendment rights combined with academic freedom assure the highest level of protection to those on public college and university campuses. This fundamental principle was set down in 1967 in *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967). In that case, this Court struck down New York's teacher loyalty laws, noting "our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." 385 U.S. at 603. Similarly, *Healy v. James*, 408 U.S. 169 (1972) unanimously upheld the speech and associational rights of radical student members of a chapter of Students for a Democratic Society, observing that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" and "reaffirming this Nation's dedication to safeguarding academic freedom." In 1995, this Court addressed viewpoint-based restrictions in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). There this Court held that the funding of groups other than those with religious viewpoints cast disapproval on particular viewpoints and was thus unconstitutional.

The modern Supreme Court has been remarkably consistent in its protection of even the most offensive speech. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (1949) (anti-Semitic ranting that "induces a condition of unrest" and "even stirs people to anger"); *Street v. New York*, 394 U.S. 576 (1969) (flag-desecration accompanied by the words "we don't need no damned flag"); *Cohen v. California*, 403 U.S. 15 (1971) (the words "Fuck the Draft" printed on the back of a young man's jacket, worn in a courthouse during the Vietnam War); *Gooding v. Wilson*, 405 U.S. 518 (1972) (the words "White son of a bitch, I'll kill you," uttered by a young man to a police officer at an antiwar protest at an army induction center); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973) (the phrase "Motherfucker Acquitted" in a headline in a student newspaper, written by a graduate journalism student who was ordered reinstated in the university.)

As Justice Robert Jackson wrote for the majority of the U.S. Supreme Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), a judgment that remains the law of the land: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what will be orthodox, in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith [in it]."

Should the opinion of the Ninth Circuit Court of Appeals stand, the students and faculty members of the nation's institutions of higher education will no longer be free to express their opinions when critical of their academic or administrative superiors and supervisors. They will be forced to submit to the orthodoxy of the moment, and to refrain from criticism bearing on how their universities

are governed and operated, on pain of punishment from petty administrators. This would betray the purpose of these great institutions and the understanding of the First Amendment. Because this issue affects every student and professor at every public college and university, there is an overriding national urgency to how this question is resolved. The Court should grant the petition in order to address and resolve this important issue.

C. The Ninth Circuit's Decision Permits Unconstitutional Viewpoint Discrimination and Eliminates a Time-Honored Forum for Opinion in Academic Work.

There can be no serious doubt that the Respondents' disapproval of the Petitioner's "disacknowledgements" section of his thesis was a viewpoint-based judgment that criticism of the university's faculty and administration, as well as certain political figures, disqualified the thesis-writer from having his academic work accepted. The Ninth Circuit took the position that the disacknowledgements section turned the thesis into a "nonconforming" thesis and that the thesis committee was within its right and powers – indeed, had its own right of academic freedom – to condemn it and refuse to issue the degree. *Brown v. Li*, 308 F.3d 939, 952 (2002). The panel concluded that the thesis committee had the right and the power to insist that if a student includes an acknowledgement section in his thesis, as the rules allow him to do, the thesis committee may dictate the point of view in that acknowledgement section:

> Plaintiff argues that he has a First Amendment right to draft an acknowledgements section from *any* viewpoint. To the contrary, *Hazelwood* and

> *Settle* establish that – consistent with the First Amendment – a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.

Id. at 953.

It is axiomatic, and surely a matter for judicial notice, that an "acknowledgements" section of a thesis, as of any book, is reserved for the author's mentioning and acknowledging people and institutions that played a critical role, positive or negative, in the author's ability to complete the project. It is hardly a part of the *academic* product, but rather the *personal opinion* of the author as to who was, and who was not, helpful to his enterprise. The panel majority nonetheless paints this exercise as part of the academic undertaking, and endows the thesis committee with the power to approve, or disapprove, the author's viewpoint. This power is said to serve "a legitimate pedagogical purpose." In other words, the thesis committee and the university administration have the power to censor the student's criticisms of the university and its faculty and administration, and even his criticism of the state's governor, under the rubric "legitimate pedagogical purpose." If so, these Respondents are the only governmental figures in our society so endowed with such an extraordinary power – to punish a citizen who criticizes them, and to get away with it because they are teachers and academic administrators. Certainly the First Amendment allows for no such gaping hole in its coverage – and surely not at the college and university level, even if *Hazelwood* arguably might endow administrators with some degree of such power at the secondary or elementary

school level. And surely this Court must not allow such a perverse result as is reached here – that academic freedom actually endows public academic administrators with the power to shut-off student criticism of their performance. This surely turns the concept of academic freedom on its head; it turns the concept into a weapon for censorship rather than a shield against it.

That this case demonstrates viewpoint discrimination is clear from this record. The record is replete with examples of acknowledgement sections that were allowed. Indeed, an acknowledgement section is very common in the academic world, and in the world of publishing in general. It is beyond doubt, on the basis of this record and even on the basis of the panel's opinion, that had Petitioner sung the praises of the university faculty and administration, and of the educational policies of the governor of California, his thesis would have been approved without a moment's hesitation. The academic portion of the thesis, after all, had been approved before the faculty committee noticed the disacknowledgements section tacked onto the final version submitted to the library. It was only when the committee members learned of the student's criticism of them and their academic and political colleagues that they balked. It is hard to find a clearer example of viewpoint-based censorship of protected opinion. And yet this exercise in the bald use of power to censor criticism is justified by the panel under the guise of academic freedom and "legitimate pedagogical purposes." There is an Orwellian aspect to such reasoning that is difficult to escape.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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